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No. 63

In the Supreme Court of the United States

OCTOBER TERM, 1947

JOSE AUDON SALAZAR DELGADILLO, PETITIONER

v.

ALBERT DEL GUERCIO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, DISTRICT NO. 16

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 76–82) is reported at 159 F. 2d 130.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 22, 1947 (R. 83). The petition for a writ of certiorari was filed April 14, 1947, and granted June 2, 1947 (R. 85). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, a resident alien, shipped on an American merchant vessel bound from Los Angeles, California, to New York City via the Panama Canal. It appears that he took shore leave at Panama City, Panama. After passing through the Panama Canal, the ship was torpedoed. Petitioner was rescued and landed in Cuba, and was thereafter brought back to the United States through Miami, Florida. The question presented is whether petitioner's arrival at Miami constituted an "entry" into the United States within the meaning of Section 19 (a) of the Immigration Act of 1917, as amended.

STATUTE INVOLVED

The Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, as amended by the Act of June 28, 1940, Sec. 20, 54 Stat. 671, provides in pertinent part:

> Sec. 1 [8 U. S. C. 173]. That the word "alien" wherever used in this Act shall include any person not a native-born or naturalized citizen of the United States; but this definition shall not be held to include Indians of the United States not taxed or citizens of the islands under the jurisdiction of the United States. That the term "United States" as used in the title as well as in the various sections of this Act shall be construed to mean the United States, and any waters, territory, or other place subject to the jurisdiction thereof, ex-

cept the Isthmian Canal Zone; but if any alien shall leave the Canal Zone or any insular possession of the United States and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.

* * * * * *

Sec. 19 (a) [8 U. S. C. 155 (a)]. * * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * *

STATEMENT

Petitioner is a Mexican citizen who legally entered the United States in 1922 or 1923 as an infant in the company of his parents, and resided here continuously until 1942 (R. 14, 15, 23, 27, 34, 36, 38, 52). On or about June 13, 1942, he departed from Los Angeles, California, as a member of the crew of the S.S. *Andrew Jackson*, an American Merchant ship, for an intercoastal voyage to New York City (R. 8a, 9). The ship's articles, which petitioner signed, called for an intercoastal voyage (between the Pacific and Atlantic or Gulf coasts of the United States) (R. 6,

8a), but he was not informed of the precise destination of the ship (R. 36, 37). En route, the ship anchored outside the Panama Canal on the Pacific side (R. 37), and petitioner took shore leave in Panama City, Republic of Panama.[1] After the ship passed through the Canal and while it was continuing its voyage to New York, it was torpedoed, and petitioner, with other survivors, was rescued and taken to Havana, Cuba (R. 15, 24, 26). About one week later, on July 19, 1942, he was returned to the United States through Miami, Florida (R. 15, 26, 37, 50). He was admitted there, in transit, for a period less than 30 days to reship foreign from San Pedro, California (R. 15, 17, 35).[2] Thereafter, petitioner made two voyages as a seaman to Hawaii and return (R. 26). On March 27, 1944, petitioner was convicted of second-degree robbery in California and sentenced, on his plea of guilty, to imprisonment for a term of one year to life (R. 16, 28, 45–48).

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[1] The following testimony was given by petitioner at the deportation hearing (R. 37):

> Q. When your ship left San Pedro destined to its unknown destination, did you pass through the Panama Canal?
>
> A. We were anchored outside the canal before we entered.
>
> Q. Did your boat stop at Panama City dock long or didn't you dock there?
>
> A. Well we were anchored outside. We got shore leave at Panama City.

[2] Petitioner's admission was facilitated by a *nunc pro tunc* waiver of the passport and visa requirements (R. 27, 50).

While petitioner was confined in the California state prison, a warrant of arrest (R. 41–42) was issued and served upon him by the Immigration and Naturalization Service thereby commencing proceedings for his deportation under Section 19 (a) of the Immigration Act of February 5, 1917 (*supra*, p. 3), on the ground that he had been sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, i. e., second degree robbery, committed within five years after entry. The warrant recited that petitioner's entry occurred on July 19, 1942. At the conclusion of the deportation hearings (R. 19–40), the presiding inspector submitted his report, including a discussion of the evidence, proposed findings of fact and conclusions of law, and recommending deportation to Mexico (R. 14–18).[3] The Board of Immigration Appeals thereafter ordered petitioner's deportation[4] (R. 53), and a deportation warrant issued (R. 13–14). Petitioner by

[3] In the "Discussion of the Evidence" (R. 14-15), the presiding inspector discussed only the Cuban landing and did not mention petitioner's testimony referring to his landing at Panama City (R. 15). The "Proposed Findings of Fact" do not refer to any foreign landings, but include a finding (R. 17) "(2) that the respondent last entered the United States July 19, 1942 at the port of Miami, Florida."

[4] The order provided that execution of the warrant should be deferred until petitioner was released from imprisonment. Petitioner was released by the California prison authorities on June 19, 1945, at which time respondent took custody of him under the deportation warrant.

counsel[5] then moved the Board of Immigration Appeals to reopen and reconsider the proceedings on the ground that the landing at Cuba was purely fortuitous (Motion contained with original exhibits on file with Clerk of this Court, pp. 113–116). On July 6, 1945, the Board denied the motion, stating: "Within the meaning of the immigration laws an 'entry' is an arrival from any foreign port or place. The fact that the respondent did not willingly go to Cuba is not material." (R. 54).

On August 27, 1945, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of California, challenging the validity of the deportation order (R. 2–8). In response to an order to show cause (R. 10), respondent filed a return (R. 11–12), to which he attached, *inter alia*, the order and warrant for petitioner's deportation and a copy of the transcript of the hearings before the presiding inspector. The writ issued (R. 57), respondent filed a return to the writ (R. 58–59), a hearing was held, and thereafter the district court entered an order granting the petition and discharging petitioner from custody (R. 59).

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court

[5] Petitioner had waived representation by counsel at the deportation hearings (R. 20–22, 33–34); the original consideration of his case by the Board of Immigration Appeals was an automatic review (see 8 C. F. R. Cum. Supp. 150.7–150.9).

was reversed (R. 83). The Ninth Circuit held, on the authority of this Court's decisions in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, and *United States ex rel. Claussen* v. *Day*, 279 U. S. 398, and its own earlier decisions in *Taguchi* v. *Carr*, 62 F. 2d 307, and *Blumen* v. *Haff*, 78 F. 2d 833, certiorari denied, 296 U. S. 644, that whether or not petitioner intended to land on foreign soil or intended to return to the United States, his return to this country after landing in Cuba constituted an "entry" for purposes of the application of Section 19 (a) of the Immigration Act of 1917 (R. 78–79). So far as appears from the opinion below, the evidence adduced at the deportation hearing with respect to petitioner's landing at Panama City was not considered or relied upon.

SUMMARY OF ARGUMENT

It has been repeatedly held by this Court and by the lower federal courts, with obvious Congressional approval, that any physical entry of an alien from a foreign country into the United States, whether such coming be the first or any subsequent one, constitutes an "entry" within the meaning of the immigration laws. Specifically, it has long been established that the period of limitation within which undesirable aliens may be deported pursuant to Section 19 (a) of the Immigration Act of 1917, as amended, and similar statutory provisions, runs from the last such

entry into the United States, regardless of the length of the alien's prior residence in this country or the duration of his visit to a foreign country.

Under a literal application of these principles, it can be concluded that petitioner's involuntary landing in Cuba constituted his subsequent return to this country an "entry." However, it may be questioned whether Congress ever contemplated that an involuntary visit to a foreign country would give rise to a new entry. Also, the previous decisions of this Court relate only to voluntary departures from the United States. In any event, the petitioner should not be discharged since the record indicates that he voluntarily landed at Panama City, Republic of Panama, a circumstance which clearly constitutes his return to this country an "entry", making him deportable under Section 19 (a) of the Immigration Act of 1917, as amended. It will therefore be appropriate for this Court to affirm the decision of the lower court on the basis of petitioner's voluntary landing at Panama City or, if it is of the opinion that the circumstances of such landing should be further explored, to direct that the case be remanded to the immigration authorities for that purpose.

ARGUMENT

IT HAS LONG BEEN HELD THAT EVERY COMING OF AN ALIEN INTO THE UNITED STATES FROM A FOREIGN COUNTRY IS AN "ENTRY" WITHIN THE MEANING OF SECTION 19(A) OF THE IMMIGRATION ACT OF 1917 AND OTHER PROVISIONS OF THE IMMIGRATION STATUTES

The construction of the word "entry" as used in Section 19 (a) of the Immigration Act of 1917, as amended, and other immigration statutes, stems from *Lapina* v. *Williams*, 232 U. S. 78. There this Court held that under Section 3 of the Immigration Act of 1907, c. 1134, 34 Stat. 898, providing for the deportation of any alien woman found engaging in prostitution within three years after entering the United States, the three-year period ran from the alien's return to this country from a temporary visit to a foreign country. This Court specifically rejected the contention that the statute applied only to immigrant aliens, i. e., within three years from the date of the alien's original entry, and hence was inapplicable to resident aliens such as Lapina.* This contention was

* In this case, which involved the Immigration Act of 1907, the Court found the legislative intent to apply the statute to those previously domiciled or resident in this country, and not merely to new immigrants, in (1) the assiduous elimination of all references to "immigrants" and the use of the word "alien" in contradiction to the use of the term "alien immigrants" employed in statutes prior to the 1903 and 1907 Acts, and (2) the explicit exclusion provisions denying admission to various classes of undesirable "aliens,"

squarely rejected by the Court in *Lewis* v. *Frick*, 233 U. S. 291, 297, where the alien had left this country and returned on the same day.

This construction of the deportation provisions of the immigration laws as applying to any entry by an alien into the United States, rather than merely to the original entry of immigrant aliens, was expressly approved and adopted in Section 1 of the Immigration Act of 1917, *supra*, p. 2, which provides that "the word 'alien' whenever used in this Act shall include any person not a native-born or naturalized citizen of the United States." As explained in the report of the Senate Committee on Immigration, S. Rep. 352, 64th Cong., 1st sess. (1916), p. 3: "It places explicitly in the statute the definition of the word 'alien,' which was given it inferentially in the immigration acts of 1903 and 1907, as held by the Supreme Court in *Lapina* v. *Williams* (232 U. S., 78)."[1]

In *United States ex rel. Claussen* v. *Day*, 279 U. S. 398, this Court was confronted with the same general question as is involved in the instant case, whether, under Section 19 (a) of the Immigration Act of 1917, a crime involving moral turpitude for which the alien was sentenced to im-

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which contained their own specific provisos and limitations tending to negative any other and implied exception. See 232 U. S. at 89–93.

[1] In addition to such "affirmative recognition" of this Court's construction of the statute (cf. *Girouard* v. *United States*, 328 U. S. 61, 70), Congress has repeatedly amended the immigration statutes without indicating any device to modify the judicial application of the "entry" concept.

prisonment for more than one year, had been "committed within five years after the entry of the alien to the United States." There an alien seaman who had first entered this country in 1912, later shipped on an American ship for a voyage to South America and return by way of Cuba. He returned from the voyage in 1918, and the crime was committed in 1921. In holding that the alien had departed from the United States and that upon his return in 1918 from South American or Cuban ports he made an entry into the United States within the meaning of the Act, this Court said (p. 401):

> The word "entry" by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act there must be an arrival from some foreign port or place. There is no such entry where one goes to sea on board an American vessel from a port of the United States and returns to the same or another port of this country without having been in any foreign port or place.

The rule of this case together with the quoted principles have since controlled the judicial and administrative application of the concept of "entry."

In *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129, it was held that the return to this country of an alien seaman who had shipped on an American vessel which stayed in Germany for

two and a half days constituted an entry. In this case the alien was deported as an alien who had overstayed the permitted period pursuant to Section 14 of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 162). Except for the new illegal entry based upon his return from Germany, the period of limitation contained in the earlier Immigration Act of 1917 would have barred deportation on the ground of his original illegal entry. Finally, in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, it was held that an alien's return to the United States from a brief visit to Cuba, after conviction of a crime involving moral turpitude, constituted an "entry," for the purposes of the provision of Section 19 (a) for deportation for such a crime committed prior to entry. And there the Court stated (p. 425) "That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptance of that word is clear enough from *Lewis* v. *Frick*, 233 U. S. 291; *Claussen* v. *Day*, 279 U. S. 398." Thus, the decisions of this Court stand for the propositions that every return of an alien from a foreign country to the United States constitutes an "entry" for the purposes of the immigration laws,[8] regardless of the legality

[8] *Kaplan* v. *Tod*, 267 U. S. 228, relied upon in the petition (pp. 6, 11), not only was decided prior to the *Claussen*, *Stapf*, and *Volpe* cases, but is entirely inapposite. In that case, a feeble minded alien immigrant was held at Ellis Island and ordered excluded, but the outbreak of World War I prevented execution of the order. The alien was then released

or duration of the alien's previous residence in this country, and that the duration of the alien's stay abroad is immaterial.[9] In all of the cases decided by this Court, the alien involved obviously intended and expected to enter a foreign port or place. In no case has the Court considered whether an "entry" may be predicated upon an involuntary touching on foreign soil.

A. IT IS NOT CLEAR WHETHER AN "ENTRY" FOR THE PURPOSES OF SECTION 19 (A) OF THE IMMIGRATION ACT OF 1917, AS AMENDED, MAY BE SAID TO OCCUR WHEN AN ALIEN RETURNS TO THE UNITED STATES AFTER AN INVOLUNTARY VISIT TO A FOREIGN COUNTRY.

In the present case, it is clear that petitioner went to Cuba only as an incident to his rescue after his ship had been torpedoed. The circumstances leading to his landing in Cuba were entirely beyond his control. Both the Board of Immigration Appeals in denying a motion to reopen the deportation proceedings (R. 54) and the

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in the custody of an immigrant aid society until such time as she could be deported safely. More than five years after the original attempted entry, deportation was sought under the first clause of Section 19, and the alien defended on the ground that five years had elapsed since her entry. In upholding the deportation order, this Court held that her release from Ellis Island under these circumstances did not constitute an "entry" and that she must be regarded as having never left the jurisdiction of the immigration authorities at the boundary line.

[9] *Lewis* v. *Frick*, *supra*, (a one-day trip to Canada); *Stapf* v. *Corsi*, *supra*, (a two-and-a-half-day stay in Germany); *Volpe* v. *Smith*, *supra*, (a brief visit to Cuba).

Circuit Court of Appeals (R. 79) held that it was immaterial whether petitioner had intended to land on foreign soil, and that his return to this country from Cuba constituted a new entry. The Circuit Court of Appeals based its decision upon the decisions of this Court in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, *United States ex rel. Claussen* v. *Day*, 279 U. S. 398, and *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129, and upon its own earlier decision in *Taguchi* v. *Carr*, 62 F. 2d 307, which it had declared was compelled by the *Stapf* case.[10]

However, in the *Volpe*, *Stapf* and *Claussen* cases, this Court was dealing with the question of whether a return to the United States from a voluntary and deliberate departure constituted an entry. In holding that it did, these decisions did not involve the involuntary departure of an alien from this country, and we know of no other decisions by this Court which have involved this circumstance. Presumably, therefore, the broad

[10] The court below also referred to its earlier decision in *Blumen* v. *Haff*, 78 F. 2d 833 (C. C. A. 9), certiorari denied, 296 U. S. 644. In that case, the alien involved originally entered the United States in 1923, committed grand larceny in 1924–1925, went to England in 1925, and was extradited to this country in 1926 and convicted on a plea of guilty. The court below held that the alien's return to this country under extradition was an entry for the purposes of the clause of Section 19 (a) which provides for deportation of any alien who was convicted, or who admits the commission, prior to entry, of a crime involving moral turpitude. This case is readily distinguished from the present case in that the alien voluntarily went to a foreign country.

language in the decisions of this Court, particularly in the *Claussen* and *Volpe* cases, to the effect that each return of an alien from a temporary trip abroad must be deemed a new entry for the purposes of the immigration laws, must be considered as applying to the facts then presented, i. e., reentries from voluntary departures abroad. This Court has not had occasion to consider whether a return to the United States after an involuntary visit to a foreign port or place, constitutes an entry.

Prior to the instant case, the problem of involuntary departure was presented only in *Taguchi* v. *Carr*, 62 F. 2d 307 (C. C. A. 9), decided and cited by the court below in the instant case, in which the alien signed on an American fishing boat to engage in fishing on the high seas and in Mexican waters. In the course of the voyage the vessel was sunk in a collision and the alien, at his captain's order and to save his life, landed on a Mexican island, where he remained for several days. The court below held the alien's landing on Mexican soil, although unintended, made his return to this country a new entry. After alluding to the facts that as a fisherman the alien must have known the perils of the sea and that in making the voyage into foreign waters he knew that he might not be able to return to the United States, the court said (p. 308):

> Under the immigration laws and the interpretation placed thereon by the Supreme

> Court, we are compelled to hold that, notwithstanding the misfortune which befell appellant, he was coming from a foreign country and therefore was subject to the immigration laws the same as though he had never resided in the United States [citing *United States ex. rel. Stapf* v. *Corsi, supra,* decided a few weeks before.]

Thus, it is clear that the Circuit Court of Appeals thought that its decision in the *Taguchi* case was compelled by *Stapf* and other decisions of this Court.[11]

The circuit courts of appeals have also had occasion to consider what constitutes an "entry" in relation to apparently unwitting departures of an alien from this country. The cases of unwitting (as opposed to involuntary) departure are *Zurbrick* v. *Borg,* 47 F. 2d 690 (C. C. A. 6), *Ward* v. *De Barros,* 75 F. 2d 34 (C. C. A. 1), and *Di Pasquale* v. *Karnuth,* 158 F. 2d 878 (C. C. A. 2), all involving passage by aliens through contiguous foreign countries while traveling as train passengers from one point in the United States to another. In the *Borg* case, the alien traveled from New York City to Detroit via the Michigan Central Railroad's Canadian route, and in the *Di Pasquale* case, the alien traveled by sleep-

[11] See also *Valenti* v. *Karnuth,* 1 F. Supp. 370 (N. D. N. Y.) in which it was held that the alien's visit to Canada in the course of a school picnic did not give rise to a new entry, on the ground that he had been subject to the control of the teacher and was therefore acting under compulsion.

ing car from Buffalo to Detroit via the same route. The alien in the *De Barros* case traveled by train from New York to California by a route partly in Mexico (presumably the Southern Pacific Railroad). In none of the three cases does it appear that the alien knew that the route would take him across the border, although in all three cases he could have ascertained that fact by inquiry. In the *Borg* and *De Barros* cases, the Circuit Courts of Appeals for the Sixth and First Circuits, respectively, held that such departure and return constituted an entry for the purposes of deportation on the ground that the alien did not have an unexpired immigration visa. In the *Di Pasquale* case, the Circuit Court of Appeals for the Second Circuit held that, for the purposes of the clause of Section 19 (a) involved in the instant case, there was no new entry.

In the *De Barros* case, in ruling that he made an entry, the First Circuit held that the controlling factor was not what the alien intended to do but what he, in fact, did; that he went on foreign soil. The court said that the case "did not differ from the situation of one setting out on foot to take a trip in this country, who, not knowing where the jurisdictional line separating us from contiguous foreign territory was, in making the trip went over the line." 75 F. 2d at 35. The decision in the *Borg* case is apparently based upon similar reasoning. On the other hand, in the *Di Pasquale* case the Second Circuit held that the necessary

intent on the part of the alien demanded knowledge by the alien that the route which he is to take will carry him across our borders; that Di Pasquale did not have that intent; and that the intent of a carrier, unknown to the alien, to carry him across a border and back again, upon a route whose termini are within the United States, should not be imputed to him. The court said (p. 879):

> Were it otherwise, the alien would be subjected without means of protecting himself to the forfeiture of privileges which may be, and often are, of the most grave importance to him. He would be charged with the duty, every time he set foot upon a public conveyance to inform himself of its projected journey. Even if aliens were adequately advised of the danger, this would be a serious, and quite useless, burden to impose upon them; but there is nothing to advise them, and the duty would in practice become a trap, whose closing upon them would have no rational relation to anything they could foresee as significant. We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous.

In both the *De Barros* and *Di Pasquale* cases, it was pointed out that there was no claim that the alien was taken by force out of the country or induced to do so by fraud or deceit.

We have found no specific legislative history which assists in the application of the concept of

"entry" under circumstances such as these. However, as pointed out earlier in this brief, the word "entry" has long been construed by this Court, with Congressional approval, to include any coming of an alien to this country irrespective of previous residence here and without regard to the length of his stay abroad. Also, it is worth emphasizing that in these cases we are not dealing with situations which present strong equities against a literal application of the word "entry." The alien is being deported not because he made a new entry but because he has committed a serious crime indicating that he is an undesirable resident.[12] Rather, the question is what application of the "entry" concept will carry out the statutory purpose. We have seen that Congress clearly intended the five-year period prescribed by Section 19 (a) to run from the alien's last entry into the United States, regardless of the length or legality of his previous residence here or of the duration of his stay abroad. In other words, for the purpose of facilitating the deportation of undesirable aliens it has long been the rule that the five-year period commences to run anew every time the alien enters this country

[12] However, in cases such as *Stapf* v. *Corsi*, *supra*, *Zurbrick* v. *Borg*, *supra*, and *Ward* v. *De Barros*, *supra*, the only offense involved was illegal entry. In each of these cases, a statute of limitations barred deportation for the alien's original illegal entry, but the alien's subsequent return to this country from a brief visit to a foreign country was held to constitute a new illegal entry for which he could be deported.

The rule reflects a deliberate philosophy of using the concept of "entry" which will prolong or renew the statutory period during which undesirable aliens may be deported. As this Court put it in *United States ex rel. Volpe* v. *Smith, supra* (p. 426): "It may be true that if Volpe had remained within the United States, he could not have been expelled because of his conviction of crime in 1925, more than five years after his original entry; but it does not follow that after he voluntarily departed he had the right of reentry. In sufficiently plain language Congress has declared to the contrary." The decision of the lower court in this case involves a literal application of this practical policy embodied in the established concept of "entry."

Upon reconsideration, however, we are inclined to suggest that the Congress may not have intended that an "entry" for the purposes of the immigration laws should be predicated upon a genuinely involuntary departure from the United States, i. e., an involuntary going to a foreign port or place. As pointed out above, nothing in the decisions of this Court requires such a result because in none of those cases was the involuntary-departure situation before the Court. More broadly, it may be said that the law rarely attaches consequences of importance to completely involuntary acts.

In the present case, petitioner as a seaman could have anticipated certain possible events which, if

they occurred, would clearly constitute his return to the United States a new entry. For example, if his ship while en route had been ordered to pick up cargo at a Mexican Pacific port, it could scarcely be contended that this was not an ordinary and probable incident of a seaman's life.[13] But his landing on Cuban soil was of a totally different nature, in that it resulted solely from unpredictable and uncontrollable forces. Thus, his Cuban landing involved not only the uncontrollable event of the torpedoing of his ship but the further accidental event that upon rescue he was taken to a foreign port rather than to an American port. Despite the known risks of enemy action, it seems unrealistic to say that the petitioner should have anticipated that his ship would be torpedoed and that in the event of his rescue he might be taken to a foreign port. It is not too much to say that his departure was in the category of forced departures which was suggested in the *De Barros* and *Di Pasquale* cases as not resulting in a new entry.

There appears to be no basis for distinguishing the present case from *Taguchi* v. *Carr, supra.* In that case, the alien landed on foreign soil following a collision at sea in which his ship was sunk. As in the instant case, the alien's departure, i. e., his going into a foreign port or place, from which he returned to this country, was the result of

[13] Shipping articles do not require specification of intermediate ports of call. 46 U. S. C. 564.

natural forces beyond his control." Thus, we have difficulty in understanding the apparent view of the Second Circuit Court of Appeals, as expressed in the *Di Pasquale* case, that the *Taguchi* case was correctly decided, in distinguishing it from the case then before that court. The Circuit Court stated that "*Taguchi* v. *Carr* is not in point: true, Taguchi was forced outside the United States, and it was a hard constraint that put him to the choice; but he did choose to re-enter and knew he was entering when he did." (p. 879). This was apparently said to distinguish Taguchi's situation from that of Di Pasquale who was asleep when he reentered the United States. But this asserted distinction entirely misses the fact that Taguchi was held to have made a new entry on the ground that he had departed from the United States, i. e., gone to a foreign place, and not because he intentionally and knowingly returned to this country.

If an "entry," for the purpose of Section 19 (a), is regarded as occurring every time that a resident alien returns to this country after touching foreign soil or visiting a foreign port or place no matter under what circumstances, then the court below was unquestionably correct in holding that the petitioner made an entry upon his

[14] It is clear that if Taguchi's ship had merely fished in Mexican territorial waters without touching at any Mexican port, his return from such a voyage would not constitute an entry. *United States ex rel. Claussen v. Day*, *supra*, at p. 401. The Immigration Service has so instructed its officers.

return from Cuba. On the other hand, if an "entry" must contain some element of volition, so that the alien's departure and return, while perhaps not a calculated act, is at least an event subject to his control, then it would seem erroneous to hold that petitioner's touching Cuban soil constituted his return to this country a new entry for the purposes of Section 19 (a). For the assistance of the Court, we should state that in an analogous situation the Immigration and Naturalization Service has not predicated an entry upon the return from an involuntary touching of foreign soil. Thus, the Service has ruled that an entry is not considered to have been made if an alien serving in the armed forces departs from and returns to the United States pursuant to orders of his superior officers. It seems to us that this ruling is clearly sound in recognizing that such departure and return of an alien serviceman is a matter completely beyond his control. In principle, we are unable to distinguish an involuntary landing in a foreign country resulting from a torpedoing or shipwreck from the situation of the alien in the armed forces.

If this Court should conclude that the circumstances under which petitioner returned to the United States after visiting Cuba do not constitute an entry, we think it can place its decision on the ground that there is no reason to believe that Congress intended an entry to be based upon the return from an involuntary touching on foreign soil.

B. THE PETITIONER'S APPARENT VOLUNTARY LANDING AT PANAMA CITY CONSTITUTES HIS RETURN TO THIS COUNTRY A NEW ENTRY UNDER WELL ESTABLISHED PRINCIPLES

Even if this Court should conclude that petitioner's involuntary visit to Cuba did not constitute his return to this country a new entry, the record strongly suggests another basis for concluding that his return to this country from the voyage in question was an entry.[15] At the deportation

[15] We should like to state, contrary to the suggestion in our brief in opposition to the granting of the petition for a writ of certiorari (at pp. 9–11), that the mere transit through the Panama Canal would not appear to be sufficient for this purpose. While a literal reading of the definition of the term "United States" in Section 1 of the 1917 Act (*supra*, p. 2) which excludes the Panama Canal Zone, would appear to support the conclusion that mere passage through the Canal *ipso facto* brings the alien into a foreign port or place (cf. *Claussen* v. *Day*, *supra*, p. 401), reference to the legislative history of this definition indicates no such effect was intended. As shown by congressional committee reports discussing the inclusion of the references to the Panama Canal in the definition of United States, the purpose was merely to make it clear that the 1917 Act did not apply to admissions to the Canal Zone and to assure that aliens native of the zone or who had entered there from foreign countries could not "claim that they had already 'entered the United States' and were therefore exempt from the immigration laws." H. Rep. 4912, 59th Cong., 1st sess. (1906), p. 21, reporting on S. 4403 which became the 1917 Act. The Immigration and Naturalization Service considers a ship making a round-trip voyage from one part of the United States to another part of the United States as having arrived from a foreign port or place by reason of passage through the Canal only if it takes on or discharges pas-

hearing, petitioner stated: "We got shore leave at Panama City." (R. 37.)[16] The clear meaning of petitioner's statement is that he, along with other members of the crew of the *Andrew Jackson*, voluntarily went ashore at Panama City, Republic of Panama. It is well established that his return to the United States after voluntarily entering a foreign country constitutes a new entry for the purpose of Section 19 of the Immigration Act of 1917. In the *Claussen* and *Stapf* cases, this Court held that where an alien seaman makes a voyage on an American ship to foreign ports, his return to this country is an entry within the meaning of the immigration statutes. In neither of those cases did it appear whether the alien had actually gone ashore, nor was it indicated that that circumstance was material.[17] In the instant case, it appears that petitioner voluntarily went ashore in a foreign country, a circumstance which seems to be an even more persuasive basis for a new entry than simply the anchoring or docking of a ship in a foreign port as in the *Claussen* and *Stapf* cases.

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sengers, cargo or crew there and not if it merely transits the Canal or fuels there. Cf. 8 C. F. R. Cum. Supp. 120.1–120.3.

[16] The full testimony on this matter is also set forth on p. 4 of this brief.

[17] In *United States ex rel. Roovers* v. *Kessler*, 90 F. 2d 327 (C. C. A. 5), where it affirmatively appeared that the alien had not gone ashore at any foreign port visited by his ship, it was held that his return from the voyage constituted an entry, citing the *Claussen* and *Stapf* cases.

The lower courts, following *Claussen* v. *Day*, have consistently held an entry to have occurred where an alien seaman returns from a voyage to foreign ports.[18] Futhermore, the same concept of "entry" has been consistently applied by the lower federal courts to the departure and return to the United States of aliens other than seamen, no matter how brief the visit. See, e. g., *Del Guercio* v. *Gabot*, 161 F. 2d 559, 561 (C. C. A. 9) (four-hour visit to Mexico); *Guarneri* v. *Kessler*, 98 F. 2d 580 (C. C. A.), certiorari denied, 305 U. S. 648 (two or three-day visit to Cuba); *Jackson* v. *Zurbrick*, 59 F. 2d 937 (C. C. A. 6) (few hours' visit to Canada); *Cahan* v. *Carr*, 47 F. 2d 604, 605 (C. C. A. 9), certiorari denied, 283 U. S. 862 (one-day visit to Tiajuana or Agua Caliente); *United States ex rel. Natali* v. *Day*, 45 F. 2d 112, 113 (C. C. A. 2) (two-day visit to Canada); *United States ex rel. Medich* v. *Burmaster*, 24 F. 2d 57, 58 (C. C. A. 8) (alien taxi driver taking passenger to Canada and returning same day); *United States ex. rel. Drachmos* v. *Hughes*, 26 F. Supp. 193 (D. N. J.), affirmed 110 F. 2d 662 (C. C. A. 3) (overnight visit to Canada); *United States ex rel. Siegel* v. *Reimer*, 23 F. Supp. 643 (S. D. N. Y.), affirmed 97 F. 2d 1020 (C. C. A. 2) (two-day visit to Canada); *Ex parte Tatsuo Saiki*, 49 F. 2d 469

[18] *United States ex rel. Lehtola* v. *Magie*, 47 F. 2d 768 (D. Minn.); *Schmucker* v. *Martinez*, 37 F. 2d 315 (C. C. A. 4); *United States ex rel. Bardakos* v. *Mudd*, 33 F. 2d 334 (D. Md.).

(W. D. Wash.) (vessel on which alien a passenger from Seattle to Alaska makes 10 hours stopover at Canadian port, alien remaining aboard); *United States ex rel. Lehtola* v. *Magie*, 47 F. 2d 768 (D. Minn.) (alien seaman on Great Lakes taking shore leave at Canadian port); *United States ex rel. Kowalenski* v. *Flynn*, 17 F. 2d 524 (W. D. N. Y.) (one-day picnic in Canada); *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961 (W. D. N. Y.) (few hour visit to Canada); *United States ex rel. Ueberall* v. *Williams*, 187 Fed. 470 (S. D. N. Y.) (one-hour visit to Canadian side of Niagara Falls).

It has been pointed out that neither the presiding inspector, the Board of Immigration Appeals, nor the court below, considered or relied upon the circumstance of petitioner's voluntary landing at Panama City. Yet it is clear, giving to petitioner's statement its normal meaning, that in fact he went ashore voluntarily at Panama City, a foreign port. And it is established that such landing constituted petitioner's return to the United States a new entry for the purposes of Section 19 (a) of the Immigration Act of 1917, as amended. Consequently, if on the present record this Court is satisfied that the petitioner landed at Panama City, it can affirm the judgment of the court below, notwithstanding that neither the immigration authorities nor the court below based the finding of an entry upon such

landing.[19] If, however, the Court is of the opinion that the evidence relating to petitioner's landing at Panama City should be further developed, we submit that the cause should be remanded to the immigration authorities to receive such further evidence. The propriety of such a disposition of the case is confirmed by the procedure followed by this Court in *Mahler* v. *Elby*, 264 U. S. 32, 45, and *Tod* v. *Waldman*, 266 U. S. 113, 118, also involving deportation proceedings. This procedure has been followed by the lower federal courts, e. g., *United States ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757 (C. C. A. 2); *Exedahtelos* v. *Fluckey*, 54 F. 2d 858 (C. C. A. 6).

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT W. GINNANE,
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

OCTOBER 1947.

[19] It is settled that an appellee or respondent may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435; *Langnes* v. *Green*, 282 U. S. 531, 538; *LeTulle* v. *Scofield*, 308 U. S. 415, 421; *Standard Accident Ins. Co.* v. *Roberts*, 132 F. 2d 794 (C. C. A. 8).

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SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1947.

Jose Audon Salazar Delgadillo, Petitioner, v. William A. Carmichael, District Director, Immigration and Naturalization Service, United States Department of Justice, District No. 16.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 10, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is detained by respondent under a deportation order, the validity of which is challenged by a petition for a writ of habeas corpus. The District Court granted the petition and discharged petitioner. The Circuit Court of Appeals reversed, 159 F. 2d 130. The case is here on a petition for a writ of certiorari which we granted because of the seeming conflict between the decision below and *Di Pasquale* v. *Karnuth*, 158 F. 2d 878, from the Second Circuit Court of Appeals.

Petitioner is a Mexican citizen who made legal entry into this country in 1923 and resided here continuously until 1942. In June of that year, when this nation was engaged in hostilities with Germany and Japan, he shipped out of Los Angeles on an intercoastal voyage to New York City as a member of the crew of an American merchant ship. The ship was torpedoed after passing through the Panama Canal on its way to New York City. Petitioner was rescued and taken to Havana, Cuba, where he was taken care of by the American Consul for about one week. On July 19, 1942, he was returned to the United States through Miami, Florida, and thereafter continued to

serve as a seaman in the merchant fleet of this nation. In March 1944 he was convicted in California of second-degree robbery and sentenced to imprisonment for a term of one year to life. While he was confined in the California prison, proceedings for deportation were commenced against him under § 19 (a) of the Immigration Act of February 5, 1917, 39 Stat. 874, as amended 54 Stat. 671, 8 U.S.C. § 155 (a).

That section provides in part:

> ". . . any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . ."

Those requirements for deportation are satisfied if petitioner's passage from Havana, Cuba, to Miami, Florida, on July 19, 1942, was "the entry of the alien to the United States" within the meaning of the Act.

In *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129, and *United States ex rel. Volpe* v. *Smith*, 289 U S. 422, there is language which taken from its context suggests that every return of an alien from a foreign country to the United States constitutes an "entry" within the meaning of the Act. Thus in the *Smith* case it was stated, 289 U. S. p. 425, that "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one" is such an "entry." But those were cases where the alien plainly expected or planned to enter a foreign port or place. Here he was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port as his destination. His itinerary was forced on him by wholly fortuitous circumstances. If, nonetheless, his return to this country was an "entry" into the United States within the meaning of the Act, the

law has been given a capricious application as *Di Pasquale* v. *Karnuth*, *supra*, suggests.

In that case an alien traveled between Buffalo and Detroit on a railroad which, unknown to him, passed through Canada. He was asleep during the time he was in transit through Canada and was quite unaware that he had left or returned to this country. The court refused to hold that the alien had made an "entry," for to do so would impute to Congress a purpose to subject aliens "to the sport of chance." 158 F. 2d 879. In this case petitioner, of course, chose to return to this country, knowing he was in a foreign place. But the exigencies of war, not his voluntary act, put him on foreign soil.[1] It would indeed be harsh to read the statute so as to add the peril of deportation to such perils of the sea. We might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory "entry" on his voluntary return. Respect for law does not thrive on captious interpretations.

Deportation can be the equivalent of banishment or exile. See *Bridges* v. *Wixon*, 326 U. S. 135, 147. The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme.

Other grounds are now sought to be advanced for the first time in support of the deportation order. They are not open on the record before us.

Reversed.

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[1] If his intercoastal voyage had continued without interruption, it is clear that he would not have made an "entry" when he landed at its termination. *United States ex rel. Claussen v. Day*, *supra*, p. 401.